United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7364

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United States Court of Appeals

FOR THE SECOND CIRCUIT

GIUSEPPE DIFORTUNATO,

Plaintiff-Appellant,

—against—

STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND,

Defendant-Appellee.

P/S

REDERI A/B SATURNUS,

Third Party Plaintiff,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellee
One State Street Plaza
New York, New York 10004

WILLIAM P. KAIN, JR.
JAMES M. HAZEN
Of Counsel.

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Statement

This is an action brought by a longshoreman-employee of third party defendant, International Terminal Operating Co., Inc. (hereinafter referred to as ITO) to recover damages for personal injuries allegedly sustained while working on the m/s Svenskund at the 21st Street Pier, Brooklyn, New York, on October 27, 1970. At that time the

m/s Svenskund was being discharged of her cargo of prepalletized bags of tapioca and other cargo by employees of the stevedore. The owner of the m/s Svenskund, Rederi A/B Saturnus (hereinafter referred to as the shipowner), impleaded ITO.

The case was tried before the Honorable Orrin G. Judd, and a jury, for eight court days between January 21 and January 31, 1975 (A. 3-5). The Court ruled at the commencement of the trial that ITO had waived its right to a jury trial and employed the jury solely in an advisory capacity on the indemnity issue (A. 101). On January 29, 1975, the jury returned a verdict in favor of the defendant shipowner (A. 5, 61-62). In answer to special interrogatories, the jury found that the m/s Svenskund was seaworthy and that the vessel's personnel were not negligent in causing plaintiff's accident. The jury also found in answer to the Trial Judge's special interrogatories that the plaintiff was 100% contributorily negligent in causing his accident, but that the shipowner was not entitled to indemnity for any portion of its legal fees and disbursements incurred in the defense of plaintiff's action (A. 65-66). After the trial the shipowner moved for a judgment in its favor against ITO based on the finding of plaintiff's 100% contributory negligence, and its motion was granted by the Trial Court's decision of May 22, 1975 (A. 98). No appeal has been taken by ITO from the judgment against it for indemnity in favor of the shipowner.

On February 10, 1975, plaintiff moved for a new trial on the grounds that the verdict was allegedly materially influenced by extraneous matters brought into the jury's deliberations and on the grounds that a juror (a Mr. Alper) was disqualified from sitting. By its Memorandum, Decision and Order dated May 22, 1975, the Trial Court denied plaintiff's motion (A. 98).

Plaintiff does not seek to overturn the jury verdict at this stage. Rather, he seeks to have the jurors summoned into court and their testimony taken as to the issues raised by the affidavit of plaintiff's counsel. (Brief of Appellant, pp. 21-22.)

The sole issue presented on this appeal then is whether the Trial Court abused its discretion in declining to summon the jurors as witnesses as to what transpired in the jury room during their deliberations.

The Proceedings Below

It must be noted at the outset that plaintiff is presenting no substantive arguments against the verdict in the shipowner's favor based on the evidence presented at trial. Plaintiff is only appealing from the denial of his motion for a new trial based on his attempted impeachment of the jury verdict. Accordingly, plaintiff has not made the transcript of the trial below a part of the record on appeal.

The factual claims of the plaintiff are synopsized by the Trial Judge in his Memorandum, Decision and Order of May 22, 1975 (A. 99-100). The Trial Judge characterized plaintiff's claims as follows:

> "[T]hat he had slipped and fallen on wet tapioca, broken dunnage, and broken pallets while he was in the hatch of a ship unloading palletized tapioca from the tropics. He asserted that this spilled cargo and debris had littered the work area for several hours, in spite of complaints which he made to other longshoremen and to the deck man. He asserted that the longshoreman superintendent had looked down the hatch and said, 'Keep working, you'll be finished soon.'" (A 99-100)

Plaintiff's appeal arises out of the disappointment of his counsel with the jury verdict against his client, and his counsel's interrogation of two of the jurors (A. 78) immediately after the jury left the courtroom. Counsel's recollection of his conversation with the jurors who were interrogated by him is narrated in his affidavit which was submitted below on the motion for a new trial (A. 71-88). No affidavit of any juror was submitted.

Counsel's affidavit alleges that "during the deliberations of the jury, Mr. Alper had communicated to the other jurors, in the role of a witness—one particularly, as an expert witness—facts concerning his personal and private experience and observations during World War II when he had been attached to an embarkation unit and had overseered loading and unloading operations involving material and supplies for the Army" (A. 72).

Counsel also stated that Mr. Alper told the other jurors "that the presence of [broken or spilled cargo, water, dunnage and broken pallets in work areas] did not render the work area unfit or unsafe or the ship unseaworthy or impose any responsibility on the shipowner, and also did not constitute negligence on the part of the shipowner" (A. 73). Counsel further claimed juror Alper stated that if such material "had to be cleared away, it was the responsibility of workers to do so, and it was the workers who had done so" (A. 73). He also charged that "Mr. Alper said the workers assumed the risk of any condition created by the presence of said substances" (A.73).

Finally, counsel maintained in his affidavit that Mr. Alper was ineligible to serve as a juror by reason of his experience in World War II and that his failure to disclose such experience rendered the jury verdict invalid (A. 74).

The affidavit of shipowner's counsel was submitted in opposition to plaintiff's motion in the Court below (A. 89-

97). Shipowner's counsel had been present during part of plaintiff's counsel's conversation with Mr. Alper (A. 91). Although counsel for the shipowner did not ask Mr. Alper questions (A. 92), Mr. Alper did volunteer information to defendant's counsel, whose affidavit below noted that juror Alper said

> "that he had been a combat-infantryman during World War II and in this capacity had the opportunity to observe the loading and unloading of ships by both the Naval crews and Army port battalions. He made no mention, as Mr. Bushlow alleges, of being an 'overseer'. Mr. Alper stated that whenever the ships he saw carry bagged cargoes there was always some leakage. He also stated that the cargo hatches he saw generally had some broken dunnage on the deck and that persons working there would kick pieces of dunnage out of their way when they encumbered the deck. Mr. Alper further stated that all the jurors thought Mr. DiFortunato was exaggerating; that they could not quite understand why he was the only one of a number of the men working there who fell; that they felt other gang members should have been called by plaintiff to corroborate his testimony as to the alleged conditions in the No. 3 'tween deck." (A. 91-92).

At no time in the presence of the shipowner's counsel did Mr. Alper say anything like longshoremen "assume the risk of loose flour, broken pallets and broken dunnage" (A. 92).

POINT I

The hearsay statements of Jurors Alper and Murphy are not admissible to impeach the jury verdict.

The entire basis of plaintiff's appeal rests upon the affidavit of his counsel relating the hearsay statements of two jurors, Messrs. Alper and Murphy. Affidavits from the two jurors themselves were not submitted by plaintiff's counsel. Now, at this late date, plaintiff is seeking to summon the jurors into Court to testify as to what took place in the jury room. The impracticality of having the jurors testify, at the earliest, one year after the trial of this case, cannot be emphasized too strongly.

The sole evidentiary basis for plaintiff's appeal and motion for a new trial in the Court below—the alleged statements of the jurors purporting to impeach their verdict, related to the Court through the hearsay affidavit of plaintiff's counsel—is incompetent and inadmissible. As is stated in 6A Moore, Federal Practice § 59.08 at 58-148-49:

> "The general rule, just discussed, against receiving the testimony of jurors to show that the verdict was effected by compromise, majority decision, or chance, or that it was a quotient verdict embraces other matters of a related character. While the rule may not be without exception, ordinarily, for the purpose of overthrowing a verdict, the testimony of jurors is incompetent to prove any matter that is inherent in the jury process of arriving at a verdict, and hence cannot be used to show: argument of a juror; statements by a juror as to facts within his private knowledge, except where part of his misconduct takes place outside the jury room, separate and apart from the deliberations of the jury; influence of a juror or jurors

upon another juror; consideration of improper or immaterial matter; improper motive, unsound reasons; misconception of the evidence; misapprehension or misapplication of the law; and other related matters."

The author's statement is grounded upon the sound policy reasons long-recognized by the Supreme Court:

> "But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

McDonald v. *Pless*, 238 U.S. 264, 267-68 (1915). See also, *Stein* v. *New York*, 346 U.S. 156, 177-79 (1952); *Mattox* v. *United States*, 146 U.S. 140 (1892); Accord, *United States* v. *Dioguardi*, 492 F. 2d 70 (2 Cir., 1974); *Miller* v. *United States*, 403 F. 2d 77 (2 Cir., 1968); *United States* v. *Crosby*, 294 F. 2d 928, 950 (2 Cir., 1961), *cert. denied* sub. nom. *Mittleman* v. *United States*, 368 U.S. 984 (1962).

Plaintiff's sole argument in support of the claimed admissibility of the jurors' statements here to impeach their verdict is that the verdict was allegedly "influenced by extraneous matter or brought about by extraneous influences." Plaintiff's argument, however, rests upon a fundamental misconception of what constitutes extraneous matter or influence.

This Court explained the concept of extraneous matter or influence in some detail in *United States* v. *Dioguardi*, 492 F. 2d 70, 79 n. 12 (2 Cir., 1974). There, this Court drew the distinction between

> ". . . proof of tampering or *external* influence, and the severe penalties imposed on those who attempt such interference, parallel the reluctance of courts to inquire into jury deliberations when a verdict is valid on its face (citation omitted). Such exceptions support rather than undermine the rationale of the rule that possible *internal* abnormalities in a jury will not be inquired into except 'in the gravest and most important cases.'"

Only recently this Court embraced the *Mattox*, *McDonald* rationale and held a juror's affidavit inadmissible to show the effect of the Trial Court's allegedly coercive statements to the jury. *United States* v. *Green*, —— F. 2d ——, 1975 Slip Op. 5901 (2 Cir., August 29, 1975). This Court noted that

> "the strong public interest in the integrity of jury verdicts and the protection of jurors from harassment requires that investigation into the subjective motivations and mental processes of jurors not be permitted." 1975 Slip Op. 5901.

The only so-called "extraneous matter" which plaintiff's counsel alleges influenced the jury was the general background and experience of Mr. Alper, who during World War II had witnessed the loading and unloading of cargo ships. Such general background and experience has been specifically held not to constitute extraneous influence, in *Womble* v. *J. C. Penney Co.*, 431 F. 2d 985, 989 (6 Cir., 1970):

> "The District Court found that the alleged misconduct of the jury did not involve elements of extraneous influences, and went on to find that the jury used the quotient only as a point for discussion in arriving at a fair verdict, that several of the comments made by jurors during deliberation were statements of general experience background and did not amount to additional evidence supplementary to that introduced during the trial."

Accord, *Stephens* v. *City of Dayton, Tenn.*, 474 F. 2d 997 (6 Cir., 1973).

Plaintiff's counsel characterizes Mr. Alper's background in his affidavit as his "experience, observations and knowledge in the field of loading and unloading vessels" (A. 79). Assuming it was related to and influenced the jury, it is simply not the extraneous matter" or "additional evidence" sufficient to allow the jury's verdict to be impeached by the juror's statements or testimony.

This distinction between external influence and the internal operations of the jury is illustrated in a number of cases. In *Mattox* v. *United States*, 146 U.S. 140 (1892) the jury verdict was overturned on the basis of affidavits by jurors that a bailiff had made prejudicial remarks to the jury about the criminal defendant and that a newspaper article portraying the defendant as guilty had come into the hands of the jurors during their deliberations. In *United States* v. *Dioguardi, supra*, the jury verdict was sustained by this Court in spite of a letter written by a juror after the verdict which persuaded a number of psychiatrists that the juror was in all probability incompetent. In *United States* v. *Crosby, supra*, this Court sustained the jury verdict despite evidence that the guilty plea of a co-defendant had become known to the jury and that a

juror had stated that his plea was evidence that the other defendants were also guilty. Similarly, in the case at bar, plaintiff's attempts to impeach the jury verdict are based on the challenge to the internal operations of the jury deliberations and not on any extraneous influence or matter.

POINT II

Plaintiff's reliance on the provisions in § 606(b) of the Federal Rules of Evidence is misplaced.

First, Rule 606(b) of the Federal Rules of Evidence (effective July 1, 1975) did not apply to the trial of this case which took place in January of 1975. Second, and more importantly, the Advisory Committee's notes to the rule cite the *Mattox* case, *supra,* as an illustration of improper extraneous prejudicial information, and there is no indication of any intent by the Committee to change the prior law which forbade impeachment of a jury verdit on the allegations of the plaintiff here. Indeed, as the legislative history of Rule 606(b) indicates, there was an attempt by the Committee in the House of Representatives to expand the permissible scope of impeachment of jury verdicts. This attempt was decisively rebuffed by the Senate, and the Senate position was adopted by the Conference Committee. As was stated in Senate Judiciary Committee Report No. 93-1277:

> "As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised."

The Senate Committee went on to state:

> "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, Rule 606 should not permit any inquiry into the internal deliberations of the jurors."

As the Conference Committee Report No. 93-1597 pointed out:

> "[T]he House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as a misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations.
>
> * * *
>
> "The Conference adopts the Senate amendment"

POINT III

Juror Alper did not wrongfully withhold information on the *voir dire* and was not disqualified.

At the outset it must be noted that this Court has held that the proper standard on appeal from a denial of a motion for a new trial is in general whether the trial court abused its discretion in denying the motion. *Cathedral Estates Inc.* v. *Taft Realty Corp.*, 228 F. 2d 85 (2 Cir., 1955). It has also been held by a federal appellate court

that this same standard applies to a motion for a new trial on the ground of alleged juror misconduct. *Thomas* v. *Nuss,* 353 F. 2d 257, 259 (6 Cir., 1965). This Court has also recently noted that "before an appellate court will overturn the trial judge's discretion on *voir dire,* the defendant must show the possibility of prejudice at the trial court was a substantial one. . . ." *United States* v. *Chiarizio,* —— F. 2d ——, 1975 Slip Op. 493, 503 (2 Cir., Nov. 11, 1975).

Plaintiff criticizes the Trial Court for not discussing plaintiff's arguments concerning juror Alper's qualifications to serve and what transpired on the *voir dire.* This criticism of the Trial Court is without merit. Since the Trial Court properly ruled that the jurors' statements were not admissible to impeach their verdict, plaintiff had no competent evidence in support of his argument against juror Alper's qualifications as a juror. As a result, that branch of the plaintiff's motion was necessarily denied.

It is apparent that plaintiff waived any rights to object at the close of the trial to the selection of juror Alper by failing to elicit further information from him on the *voir dire,* including any past observations of the loading and unloading of ships he may have had. As this Court pointed out, regarding disqualification on the basis of a juror's background and experience, in *Andrade* v. *United Fruit Co.,* 312 F. 2d 889 (2 Cir., 1963):

> "There was no reason why the juror should have supposed his employment so disqualified him; if plaintiff's counsel desired further information concerning this, it was for him to obtain it on the *voir dire.*"

Similarly, in the case at bar, there was no reason for juror Alper to suppose that his service as an Army combat infantryman, where he had the opportunity to witness the

loading and unloading of ships some 30 to 35 years ago (A. 95-96), should disqualify him as a juror.

During the *voir dire* examination of the jury the jurors had been asked whether they or their close relatives had previously been employed in loading or unloading ships (A. 100). Plaintiff concedes that juror Alper had never been engaged in such loading or unloading operations. (Brief of Appellant p. 17.) Therefore, not even plaintiff's counsel alleges that juror Alper gave any false statements on the *voir dire*. As to the allegation that Mr. Alper withheld information he should have volunteered, it was quite reasonable for juror Alper to have concluded that the *voir dire* was not intended to aim at the exclusion of any prospective jurors who may have had some familiarity with maritime matters based on their experiences of 30 to 35 years ago (A. 96). Indeed, the Trial Court specifically found: "The juror's experience in watching unloading operations during military service did not constitute the type of waterfront employment concerning which he had been questioned during the voir dire" (A. 104).

The cases cited by plaintiff's counsel, on closer scrutiny, do not support plaintiff's position. In *Reynolds* v. *United States,* 98 U.S. 145 (1878), the Supreme Court held that a juror actually challenged for having an opinion was not disqualified. In *Morrison* v. *Ted Wilkerson, Inc.*, 343 F. Supp. 1319 (W.D. Mo., 1971) the Court held that there it was not prejudicial to the moving party that a juror had filed prior injury claims. In *Beanland* v. *Chicago, Rock Island & Pacific R. Co.,* 345 F. Supp. 227 (W.D. Mo., W.D., 1972) the Court stated that a false answer or intentional deception was required to upset the jury verdict rather than an inadvertent failure to volunteer information. Only in *King Size Publications Inc.* v. *American News Co.*, 194 F. Supp. 109 (D.N.J., 1961), *cert. denied,* 368 U.S. 920

(1962), was a jury verdict actually upset by the failure of a juror to disclose information on the *voir dire*. This reversal of the jury verdict, done by the trial court in the exercise of its discretion, was predicated on a bizarre set of facts. It appeared that the juror in question communicated to the Court by letter his irrational aversion to the anti-trust laws of the United States, which the trial court held was sufficiently prejudicial to a party in an anti-trust case relying upon those laws.

It cannot be said that juror Alper's experience and general background was "so obvious a disqualification or so inherently prejudicial as a matter of law, as to require the granting of a new trial." *United States* v. *Eury*, 268 F. 2d 517, 522 (2 Cir., 1959), citing *Cavness* v. *United States*, 187 F. 2d 719, 722-23 (9 Cir., 1951), *cert. denied*, 341 U.S. 951 (1951).

Plaintiff's counsel's charge that juror Alper was prejudiced against his client is simply without basis in the record. Juror Alper did not know Mr. DiFortunato or the facts of his case prior to the trial below. It was not the purpose of identifying those members of the venire who were or had been employed in maritime commerce or engaged in loading and unloading of ships to eliminate all prospective jurors with *any* knowledge of maritime matters. Rather, it was the purpose of the *voir dire* to eliminate dangers of sympathies and prejudices. Indeed, the Trial Judge specifically charged the jury:

> "You bring into the jury room, into the courtroom, all the experience and background of your lives. . . . You don't check your common sense outside the door." (A. 43)

Had plaintiff wished to bar any maritime knowledge from the jury, it was incumbent upon his counsel to ask the Trial

Court to inquire on the *voir dire* if any members of the venire had ever been on a ship or had ever witnessed loading and unloading of ships, and to follow up affirmative responses. This, plaintiff's counsel did not do.

Plaintiff's argument that he is entitled to a trial by six jurors totally ignorant of maritime practice, if sustained, "would result in unwarranted reversals of perfectly fair jury verdicts and would inject an unjustifiable degree of instability into the jury system." *Fritz* v. *Boland & Cornelius,* 287 F. 2d 84 (2 Cir., 1961).

POINT IV

Plaintiff has failed to establish a *prima facie* showing of prejudice by what allegedly took place in the jury deliberations.

At the outset, it should be borne in mind that "it is an impossible standard to require that tribunal [the jury] to be a laboratory, completely sterilized and freed from any external factors." *Rideau* v. *Louisiana,* 373 U.S. 723, 733 (1963) (Justice Clark, dissent).

The fatal flaw in plaintiff's argument on prejudice is the misguided notion that anything which transpires within the jury room tending to influence the jury against the plaintiff in whatever degree is *ipso facto* prejudicial. Interestingly enough, plaintiff apparently does not feel the "prejudice" here approached being determinative of the outcome of this litigation. No motion was brought on below for a new trial on the ground that the verdict was against the weight of the evidence, and no appeal was taken on such grounds. The necessary inference to be drawn from plaintiff's inaction is that there was ample evidence from which the jury could have, and did, find that plaintiff's accident was caused solely by his own negligence and not

by any negligence or unseaworthiness on the part of the ship.

Moreover, the proper test for prejudice requiring a new trial appears to be more than one of "adverse impact." As was stated in *United States* v. *McKinney,* 429 F. 2d 1019, 1022-23 (5 Cir., 1970):

> "All must recognize, of course, that a complete sanitizing of the jury room is impossible. We cannot expunge from jury deliberations the subjective opinions of jurors, their additudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations. Nevertheless, while the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra *facts* into the jury room. In every criminal case we must endeavor to see that jurors do not testify in the confines of the jury room concerning specific facts about the specific defendant then on trial. * * * To the greatest extent possible all factual testimony must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime."

Accord, *U.S. ex rel. Owen* v. *McMann,* 435 F. 2d 813 (2 Cir., 1970).

In *Owen,* the jurors or some of them were told by other jurors during the trial and the deliberations that the defendant had been in trouble all his life; that he had been suspended from the police force in connection with the unauthorized use of a patrol car; that he had been involved in a fight in a tavern; that one of the jurors' husbands was an investigator and that he knew all about plaintiff's back-

ground and character which was bad; and that petitioner's father was always getting him out of trouble. Based on this testimony, this Court found that "Owen's case falls on the impermissible side of this by no means bright line, although perhaps not by much." 435 F. 2d 818-19.

The test set forth in *McKinney* and approved and applied in *Owen* of specific facts about a specific party is plainly not met here. Plaintiff is not even claiming that any juror told the others any specific facts he or she knew about plaintiff *dehors* the record. On the contrary, the Trial Court found correctly that juror Alper's "remarks, if made, were essentially the application of general experience to the facts concerning which the plaintiff and the other witnesses had testified" (A. 104). As a result, the allegations of plaintiff's counsel as to what the jurors told him do not establish a *prima facie* showing of prejudice and do not warrant a remand for the taking of the jurors' testimony.

CONCLUSION

The decision of the District Court denying plaintiff's motion to set aside the verdict and for a new trial should be affirmed in its entirety.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellee
One State Street Plaza
New York, New York 10004

WILLIAM P. KAIN, JR.
JAMES M. HAZEN
Of Counsel.

Two COPY received
11/25 1975
IRVING B BUSHLOW, ESQ
Stephen Bhatt[illegible]

Copies
11/25/75
Alexander, [illegible]
Schwartz & Cohen